

IP 01-0320-C T/F Corey v. Barnhart  
Judge John D. Tinder

Signed on 3/14/02

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

COREY, PENNY A,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
COMMISSIONER OF SSA,	)	CAUSE NO. IP01-0320-C-T/G
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

PENNY COREY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	IP 01-0320-C-T/F
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

**ENTRY REVIEWING COMMISSIONER’S DECISION<sup>1</sup>**

Plaintiff requests judicial review of the final decision of the Commissioner of Social Security (“Commissioner”) denying her application for Disability Insurance Benefits (“DIB”). The court rules as follows.

**I. Background**

Plaintiff, Penny Corey, applied for DIB, alleging that she became disabled on November 4, 1997. Her application was denied initially and again on reconsideration. Administrative Law Judge (“ALJ”) James R. Norris held a hearing, and on May 21, 1999, issued a decision denying benefits. He found that she did not have a severe impairment

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<sup>1</sup> This Entry is a matter of public record and is being made available to the public on the court’s web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

or impairments. The Appeals Council denied her request for review, making the ALJ's decision the final decision of the Commissioner.

Prior to the alleged onset date of November 4, 1997, Corey complained of breathing problems, and she was diagnosed with bronchial asthma. Spirometry testing in 1993 showed "a mildly restrictive and severely obstructive pattern." (R. at 150.) In 1994, spirometry testing showed "moderately restrictive and severely obstructive pattern." (*Id.* at 148.) In June 1995, L.Y. Frank Wu, M.D., an allergist, diagnosed her with bronchial asthma, chronic, severe though stable and controlled with medication. (*Id.* at 144.) Spirometry testing in May 1996 was normal and radiological test results in December 1996 were normal. (*Id.* at 143, 256.) In July 1996, a treadmill exercise test revealed that Corey was able to exercise to 7.6 METS. (*Id.* at 121, 124.) In May 1997, Dr. Wu diagnosed chronic, moderate bronchial asthma. (*Id.* at 140.)

On May 4, 1998, Dr. Wu diagnosed Corey with bronchial asthma, moderately chronic (R. at 144) and prescribed medication. He found that medication stabilized and controlled Corey's asthma. (*Id.* at 46.) Pulmonary function (spirometry) test results on May 4 1998 were normal. (*Id.* at 47.) At the end of May, a treadmill exercise test showed that Corey was able to exercise to 5.1 METS (*Id.* at 180-81).

On November 4, 1998, Dr. Wu examined Corey. A pulmonary function test result revealed a significant decrease in her pulmonary status and suggested mild obstructive lung disease. (R. at 41, 45.) Dr. Wu opined that the test results suggested inadequate

anti-inflammatory treatment regimen, so he changed her medication regimen. (*Id.* at 41, 44.)

In December 1998, Dr. Wu indicated that pulmonary function test results showed “mildly restrictive patterns with improvement of her small airway reactivity.” (R. at 41.) Corey reported that her lungs felt better following a change in her asthma regimen. (*Id.* at 42.) Dr. Wu diagnosed Corey with allergic rhinitis and bronchial asthma in the “chronic moderate persistent category.” (*Id.* at 41.)

Starting in May 1996, Corey was treated by James Ciulla, M.D., for various complaints. These included leg weakness, thigh pain, burning pains, dizziness, and numbness with a near syncopal episode, headaches, fatigue, exhaustion, and depression. He prescribed her the anti-inflammatory medications Naprosyn and Feldene and the anti-depressant Effexor, and steroids.

On November 4, 1997, Corey reported that the last few days were her worst ever. Dr. Ciulla advised her that she was “truly disabled for work. . . .” (R. 208.) On November 14, Corey reported that she had taken the narcotic pain medication MS Contin four days in a row. (*Id.* at 205.) On December 5, she did not need that medication and was taking ibuprofen. (*Id.*)

In January 1998, Dr. Ciulla indicated in a letter that Corey complained of numbness, burning sensation and pain in her extremities, fatigue, shortness of breath and headaches.

(R. at 33.) He opined that she was disabled due to the combination of her neuropathy with painful paresthesias, chronic recurrent cephalgia, fibromyalgia, asthma, allergies, chronic fatigue, and coronary artery disease. (*Id.*)

On January 9, Dr. Ciulla prescribed Neurontin for neuropathy and burning pain. The dosage was increased on January 22, and on January 30, Corey did not experience burning pain, but her muscle aches were bad. Then, on February 6, Corey visited Dr. Ciulla who increased the dosage of Neurontin. He completed a Long Term Disability Claim Physician's Statement indicating that Corey should not be required to perform mental or physical work as it "totally wipes her out and takes days to recover." (R. at 52.) On March 6, Corey reported that she took MS Contin only when absolutely necessary with incapacitating pain, she still had numbness of both hands and legs and various parts of her body at times, but overall was "better" and her asthma was doing great. (*Id.* at 204.) On March 20, she reported that the Neurontin was helping the burning pain, but she still had headaches and muscle pain. (*Id.* at 202.)

On May 15, Corey told Dr. Ciulla that Naproxen barely held down her pain, Neurontin was no help, and her chest ached. (R. at 202.) He instructed her to take more Neurontin and use Feldene. Her medications were adjusted on May 29 and June 12.

In April 1998, Corey had a consultative examination performed by Mario Robbins, M.D. (R. at 173-77.) The exam was unremarkable. She was alert, oriented and in no acute distress. She was able to walk, stand, squat, bend, and get on and off the exam

table without difficulty. (*Id.* at 173-74.) Her motor strength, sensation, reflexes, handgrip, manipulative abilities and range of motion were all normal. (*Id.* at 174-75.) There were no signs of tenderness along her spine, atrophy or rigidity. Her breathing was normal with no signs of wheezing, rales or crackles. (*Id.* at 174.) Dr. Robbins indicated that her pulmonary function test suggested mild obstructive disease and her asthma was controlled with medication. He suggested continued therapy for her fibromyalgia and chronic fatigue syndrome. (*Id.* at 176.)

In September 1998, Dr. Ciulla opined in a letter to the state agency disability bureau that Corey had constant burning pain, had paresthias (abnormal sensation) in her extremities, was easily fatigued, suffered light headedness, loss of balance and headache and her concentration and memory were affected, had fibromyalgia trigger points, arthritis and polyneuropathy pains not well-controlled by medication. He indicated that her asthma had improved, but “all other symptoms have worsened.” (R. at 200.) He said she was “barely able to manage her daily living.” (*Id.*) He indicated that her polyneuropathy, chronic fatigue syndrome with myalgia and muscle weakness were her main diagnoses. Subsequently, in December 1998, Dr. Ciulla stated he did not believe that Corey could return to work. (*Id.* at 49.)

Also in September 1998, W.S. Tucker, M.D., a non-examining state agency reviewing physician, assessed Corey’s Residual Functional Capacity. He indicated that

she should avoid concentrated exposure to extreme cold, heat and humidity, and moderate exposure to fumes, odors, dust, gases, and poor ventilation. (R. at 233.)

In March 1998, Corey had a consultative examination performed by Richard Longhead, Ph.D, a psychologist. On exam, she was fully oriented, and Dr. Longhead opined that her cognitive functioning rated at the fiftieth percentile and her score on the immediate memory test might suggest that she was beginning to have memory problems. (R. at 155.) He opined that she had some kind of brain deterioration, but that this interrupted her lifestyle “in a relatively small way.” (*Id.*) He diagnosed her with dementia.

In April 1998, Paul Aleksic, Ph.D., a state agency reviewing psychologist, reviewed the medical record and opined that Corey did not have a severe mental impairment. (R. at 159.) He remarked that the medical evidence did not document a definitive memory impairment and that Dr. Longhead gave only a “speculative diagnosis of dementia.” (*Id.* at 160.)

## **II. Discussion**

In reviewing the Commissioner’s final decision, the court must accept the ALJ’s findings of fact as conclusive if the findings are supported by substantial evidence and there has been no error of law. *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7<sup>th</sup> Cir. 2001). Substantial evidence means such relevant evidence that a reasonable mind could accept as adequate to support a conclusion. *Id.*; *Zurawski v. Halter*, 245 F.3d 881, 887 (7<sup>th</sup> Cir.

2001). The court may not reconsider the facts, reweigh the evidence, or substitute its judgment for that of the ALJ. *Kepple v. Massanari*, 268 F.3d 513, 516 (7<sup>th</sup> Cir. 2001); *Cannon v. Apfel*, 213 F.3d 970, 974 (7<sup>th</sup> Cir. 2000). The ALJ must articulate his analysis of the evidence and “build an accurate and logical bridge from the evidence to [his] conclusion.” *Clifford v. Apfel*, 227 F.3d 863, 872 (7<sup>th</sup> Cir.), *as amended* (Dec. 13, 2000).

To be eligible for disability benefits, a claimant must establish that she suffers from a “disability” within the meaning of the Social Security Act (the “Act”).<sup>2</sup> In determining whether a claimant is disabled, the ALJ engages in a five-step inquiry. *Rucker v. Chater*, 92 F.3d 492, 494 (7<sup>th</sup> Cir. 1996) (summarizing the agency regulations set forth in 20 C.F.R. § 404.1520). The ALJ decided this case at step two, by finding that Corey does not have any impairment or impairments that constituted a severe impairment under the Act. Ms. Corey challenges that decision. In particular, she contends that (1) her bronchial asthma, standing alone, constituted a severe impairment; (2) the ALJ failed to consider adequately the combined effect of all her impairments; (3) the ALJ should have recontacted her treating physician, Dr. Ciulla, to address the concern that objective medical findings did not corroborate his opinion; (4) the ALJ “played doctor” with respect to muscle weakness and atrophy; (5) the ALJ erroneously evaluated her mental condition; (6) he erroneously evaluated her activities; (7) her use of medications was inconsistent

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<sup>2</sup> “Disability” is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

with a non-severe impairment; and (8) the ALJ failed to follow *Sarchet v. Chater*, 78 F.3d 305, 306-07 (7<sup>th</sup> Cir. 1996).<sup>3</sup> Though Corey raises numerous challenges to the ALJ's decision, the court need address only those which lead to the conclusion that reversal and remand are required.

Corey first argues that the ALJ failed to consider adequately the combined effect of all her impairments, based principally on his failure to include the word “combination” or “combined” in his decision. She relies on *Steward v. Bowen*, 858 F.2d 1295, 1298 (7<sup>th</sup> Cir. 1988) (stating that “it is clear from the ALJ's opinion that he did in fact consider the combined impact of all of Steward's impairments in determining that they neither meet nor equal a listed impairment. The ALJ specifically found that the medical evidence did not establish ‘that any of claimant's impairments, either alone or in combination, are severe enough to either meet or equal the requirements of any impairments listed in Appendix 1 of the Regulations.’”). Defendant argues that Corey's reliance on *Steward*, is misplaced because that case was decided at step three of the sequential analysis, whereas, this case was decided at step two; and, *Steward* does not require the ALJ to use the term “combined” or “combination” in analyzing the claimant's impairments.

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<sup>3</sup> Corey also argues that the Commissioner's decision must satisfy her own standard of articulation, citing to Social Security Ruling (“SSR”) 96-8p. This SSR is inapplicable at this point because it addresses the assessment of an individual's residual functional capacity at steps 4 and 5 of the sequential evaluation process, and the ALJ never went beyond step two of that process.

Corey replies, correctly, that the ALJ must consider the combination of impairments at step two as well as step three. In *Johnson v. Sullivan*, 922 F.2d 346, (7<sup>th</sup> Cir. 1991), the Seventh Circuit said of step two: “Step two of the evaluation process examines whether a claimant’s impairment is ‘severe.’ The regulation provides:

If you do not have any impairment *or combination of impairments* which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

*Id.* at 348 (quoting 20 C.F.R. §§ 404.1520(c) & 416.920(c) (emphasis added in *Johnson*)).

*Steward* does not hold that the ALJ must use terminology such as “combined” or “combination” in analyzing the claimant’s impairments, but the reviewing court must be able to determine that the ALJ did in fact consider the combined effect of a claimant’s impairments. The use of the plural “impairments” alone is neither specific nor clear enough to satisfy this court that the ALJ considered the combined effect of Corey’s multiple impairments. Though use of words such as “combination of impairments” or “combined effect of impairments” may not be mandatory, use of these or similar words would clearly reflect that the ALJ considered Corey’s impairments in combination. *Cf. Loy v. Sec’y of Health & Human Servs.*, 901 F.2d 1306, 1310 (6<sup>th</sup> Cir. 1990) (“An ALJ’s individual discussion of multiple impairments does not imply that he failed to consider the effect of the impairments in combination, where the ALJ specifically refers to a ‘combination of

impairments' in finding that the plaintiff does not meet the listings"). In the absence of such words or some other clear indication that the ALJ considered the combined effect of Corey's impairments in reaching his decision (and there is none), the court must reverse and remand the ALJ's decision.

Corey argues that the ALJ should have recontacted her treating physician, Dr. Ciulla, to address the concern that objective medical findings did not corroborate the physician's opinion. She cites 20 C.F.R. § 404.1512(e), for support. That regulation provides in pertinent part:

(e) Recontacting medical sources. When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision. To obtain the information, we will take the following actions.

(1) We will first recontact your treating physician or psychologist or other medical source to determine whether the additional information we need is readily available. We will seek additional evidence or clarification from your medical source when the report from your medical source . . . does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. We may do this by requesting copies of your medical source's records, a new report, or a more detailed report from your medical source, including your treating source, or by telephoning your medical source.

*Id.* Defendant responds that the ALJ was not required to recontact Dr. Ciulla because his opinion was not entitled to controlling weight.

Defendant cites no authority to support its implication that 20 C.F.R. § 404.1512(e) applies only if the treating physician's opinion is entitled to controlling weight. Indeed, §

404.1512(e) appears to apply regardless of whether a treating physician's opinion is given controlling or some lesser weight. *Knight v. Chater*, 55 F.3d 309 (7<sup>th</sup> Cir. 1995), does not directly address the ALJ's duty to recontact a treating physician and does not mention § 404.1512(e). Instead, it concerns the weight that should be given a treating physician's opinion. *Knight*, 55 F.3d at 314. So it is with SSR 96-2p. The ALJ discredited Dr. Ciulla's opinion because of the lack of objective findings, and there is no indication in the record that the ALJ recontacted Dr. Ciulla to find out whether he had any findings or other information to support his opinion. The ALJ's failure to do so was error. See, e.g., *Cleveland v. Apfel*, 99 F. Supp. 2d 374, 380 (S.D.N.Y. 2000) ("When the opinion submitted by a treating physician is not adequately supported by clinical findings, the ALJ must attempt, sua sponte, to develop the record further by contacting the treating physician to determine whether the required information is available.").

In a related argument, Corey contends that the ALJ failed to acknowledge the significance of the trigger points reported by Dr. Ciulla. *Sarchet v. Chater*, 78 F.3d 305 (7<sup>th</sup> Cir. 1996), recognizes that the symptoms of fibromyalgia are "entirely subjective" and there are no objective clinical tests for the presence or severity of the disease. *Id.* at 306. However, one of the principal symptoms of the disease is multiple tender spots or trigger points. *Id.* The ALJ does not address the trigger points in his decision. Defendant responds that Dr. Ciulla's opinion was entitled to little weight because it was unsupported by any clinical findings or specific descriptions of how Corey's fibromyalgia symptoms limited her ability to perform work activity. Given the nature of the disease, the absence of

clinical findings is not surprising, and the ALJ never recontacted Dr. Ciulla to obtain his opinion of how Corey's symptoms limited her ability to engage in basic work activities.

On remand, the ALJ should contact Dr. Ciulla to address the concern about the lack of support for Dr. Ciulla's opinion and obtain the physician's opinion of how Corey's fibromyalgia and other symptoms limited her ability to engage in basic work activities.

Corey contends that the ALJ erroneously evaluated her activities of daily living. She argues that the overwhelming evidence shows her activities were "seriously circumscribed," citing pages 89, 92, 97-99, 102-05 and 107-08 of the record. The ALJ barely mentions Corey's activities in his decision, stating only that her subjective complaints of any totally debilitating pain and/or other debilitating symptomatology were not supported by her activities of daily living, specifically referring to furniture refurnishing at home. (R. at 22.) In *Zurawski v. Halter*, 245 F.3d 881 (7<sup>th</sup> Cir. 2001), the plaintiff challenged the ALJ's determination that the plaintiff's complaints of disabling pain were "not entirely credible due to the inconsistencies with the objective medical evidence, and inconsistencies with daily activities." *Id.* at 887. The court said: "[W]e are left to ponder what exactly are these 'inconsistencies' because the ALJ provided no further explanation. While the ALJ did list Zurawski's daily activities, those activities are fairly restricted (e.g., washing dishes, helping his children prepare for school, doing laundry, and preparing dinner) and not of a sort that necessarily undermines or contradicts a claim of disabling pain." *Id.*

The ALJ in this case only mentions one of Corey's activities—furniture refinishing—and does not identify the others upon which he relies in discounting her complaints of debilitating pain. A review of those pages of the record identified by Corey in her brief suggests that her activities, like those of the plaintiff in *Zurawski*, were fairly restricted and would not necessarily undercut her complaints of debilitating pain. Of course, as the ALJ did acknowledge, the degree of Corey's pain varies from day to day. (R. at 20.) On remand, the ALJ should articulate why Corey's daily activities, which appear to be quite limited, require her to pace herself, take breaks, and at times obtain her husband's assistance, are inconsistent with her subjective complaints of any debilitating pain and/or any other debilitating symptomatology. Cf. *Clifford v. Apfel*, 227 F.3d 863, 872 (7<sup>th</sup> Cir. 2000), *as amended* (Dec. 13, 2000) (noting "minimal daily activities . . . do not establish that a person is capable of engaging in substantial physical activity").

Corey maintains that her use of medications was inconsistent with a non-severe impairment. SSR 96-7p instructs that in assessing a claimant's symptoms, an ALJ must consider the type, dosage, effectiveness and side effects of any medication the claimant takes or has taken to alleviate pain or other symptoms. Similarly, the Seventh Circuit has said if it is claimed that pain is a significant factor in the claimant's inability to work and the objective medical evidence does not support the claimant's subjective allegations of pain, then the ALJ must consider many factors, including the dosage and effectiveness of any pain medications. *Zurawski*, 245 F.3d at 887; *Luna v. Shalala*, 22 F.3d 687, 691 (7<sup>th</sup> Cir. 1994).

Corey has been prescribed Neurontin, an anti-inflammatory, an anti-depressant, and the narcotic MS Contin. The ALJ's decision mentions only Corey's medication for an elevated heart rate and states that it is apparently controlled with medication. (R. at 21.) He does not discuss these other medications which she was prescribed. Thus, it is unclear whether the ALJ took all of Corey's medications into consideration in determining that she did not suffer from a severe impairment or combination of impairments. On remand, the ALJ should consider them in assessing her symptoms and complaints of debilitating pain and/or other symptomatology.

### III. Conclusion

For the foregoing reasons, the final decision of the Commissioner of Social Security in this case is **REVERSED** and this case is **REMANDED** pursuant to sentence four of § 405(g) for proceedings consistent with this Entry to allow the ALJ to (1) recontact Dr. Ciulla to (a) address the concern over the lack of objective medical findings supporting Dr. Ciulla's opinion and (b) specifically describe how Corey's fibromyalgia symptoms and other symptoms limited her ability to perform work activity; to more fully address Corey's activities of daily living; (2) articulate why Corey's activities of daily living are inconsistent with her subjective complaints of any debilitating pain and/or any other debilitating symptomatology; and (3) consider all of Corey's medications in assessing her symptoms and complaints of debilitating pain and/or other symptomatology.

ALL OF WHICH IS ORDERED this 14<sup>th</sup> day of March 2002.

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John Daniel Tinder, Judge  
United States District Court

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